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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 511

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE NEW YORK AND LONG BRANCH RAILROAD COMPANY,

Appellants,

vs.

THE DEPARTMENT OF PUBLIC UTILITIES, BOARD OF PUBLIC UTILITY COMMISSIONERS, STATE OF NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

JUDSON C. MCLESTER, JR.,
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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Questions presented	2
State statute involved	4
The federal question raised	4
Statement	5
The questions are substantial	10
Appendix "A"—Opinions of the Supreme Court of New Jersey and of the Board of Public Utility Commissioners	13
Appendix "B"—Applicable New Jersey statutes	51
Appendix "C"—Letter dated August 22, 1950 from Judson C. McLester, Jr., to Emmett T. Drew, Secretary of the Board of Public Utility Commissioners	53
Appendix "D"—Excerpt from opinion of the New Jersey Supreme Court showing federal question	54

Table of Cases Cited

Banton v. *Belt Line Ry.*, 268 U.S. 413	11
Central Railroad Company of New Jersey v. *Department of Public Utilities*, 7 N.J. 247, 10 N.J. 255	6
Chicago, Milwaukee & St. Paul Ry. Co. v. *Public Utilities Comm.*, 274 U.S. 344	2, 11
Kansas City Southern Ry. v. *Albers Commission Co.*, 223 U.S. 573	2, 4
Norfolk and Western Ry. v. *West Virginia*, 236 U.S. 605	2, 11
Northern Pacific Ry. Co. v. *North Dakota*, 236 U.S. 585	2, 11
Ohio Bell Telephone Co. v. *Commission*, 301 U.S. 292	2, 11
Public Service Coordinated Transport v. *State*, 5 N.J. 196	4

Page

Railroad Commission of California v. *Pacific Gas Co.*, 302 U.S. 388 11
Smyth v. *Ames*, 169 U.S. 466 ..... 2, 11
Truax v. *Corrigan*, 257 U.S. 312 2
United Gas Co. v. *Texas*, 303 U.S. 123 ..... 2, 4
Washington ex rel. Oregon R. & N. Co. v. *Fairchild*, 224 U.S. 510 11

STATUTES CITED

Constitution of the United States, 14th Amendment .. 2, 3
New Jersey Revised Statutes 48:2-21d, N.J.S.A. 4, 5
Rules of the Supreme Court of New Jersey, Rule 1:4-8 2
United States Code, Title 28, Section 1257(2) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 511

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE NEW YORK AND LONG BRANCH RAILROAD COMPANY, EACH A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF NEW JERSEY,

Appellants,

vs.

THE DEPARTMENT OF PUBLIC UTILITIES, BOARD OF PUBLIC UTILITY COMMISSIONERS, STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Appellants submit their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final decree and judgment of the Supreme Court of New Jersey entered in this cause.

Opinion Below

The opinion of the Supreme Court of New Jersey, which is the subject of this appeal, is reported in 10 N.J. 255.

The earlier opinion of the Supreme Court of New Jersey in the same case is reported in 7 N.J. 247. A copy of each of the opinions of the Supreme Court of New Jersey and a copy of the Decision and Order on Remanded Rehearing of the New Jersey Board of Public Utility Commissioners (Docket No. 4000) are attached hereto as Appendix A.

Jurisdiction

The decree and judgment of the Supreme Court of New Jersey was entered on June 26, 1952. Pursuant to the provisions of Rule 1:4-8 of the Rules of the Supreme Court of New Jersey, Appellants filed a petition for rehearing with that Court on July 7, 1952. The petition for rehearing was denied without opinion on September 8, 1952. A petition for appeal is presented to the Supreme Court of New Jersey on October 21, 1952. The jurisdiction of the Supreme Court to review the decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the decree and judgment on appeal in this case: *United Gas Co.* v. *Texas*, 303 U.S. 123, 142-143; *Ohio Bell Telephone Co.* v. *Commission*, 301 U.S. 292; *Gt. Northern Ry.* v. *Washington*, 300 U.S. 154, 165-167; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Public Utilities Comm.*, 274 U.S. 344; *Truax* v. *Corrigan*, 257 U.S. 312, 324-325; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U.S. 585; *Norfolk & Western Ry.* v. *West Virginia*, 236 U.S. 605; *Kansas City Southern Ry.* v. *Albers Commission Company*, 223 U.S. 573, 591; *Smyth* v. *Ames*, 169 U.S. 466.

Questions Presented

1. Is it a denial of that substantive and procedural due process of law guaranteed by the Fourteenth Amendment

to the United States Constitution for a state board of public utility commissioners to compel a railroad to reduce its rates for intrastate commuted fare service when the uncontradicted and comprehensive evidence presented conclusively established that the existing rates are inadequate to defray the out-of-pocket cost of rendering the service?

2. Does the action of a state board of public utility commissioners in refusing to grant a railroad a requested increase in intrastate commuted fares constitute an illegal taking of the railroad's property in violation of the substantive and procedural due process provisions of the Fourteenth Amendment to the United States Constitution when the exhaustive evidence, without refutation, proved that under the existing and proposed intrastate commuted fares the direct out-of-pocket cost incurred by the railroad in performing the service substantially exceeds the income attributable to that service?

3. In a hearing to determine the justness and reasonableness of increased intrastate commuted fares contained in tariffs filed by a railroad, does the requirement that the railroad submit evidence of the value of the property used or usable in the service involved as a predicate for a rate base constitute a denial of due process of law, repugnant to the Fourteenth Amendment to the United States Constitution, if it is proved that under both the present and proposed rates the direct out-of-pocket cost of providing the service exceeds the derivative revenue?

4. Is the due process clause of the Fourteenth Amendment violated if a state board of public utility commissioners requires a railroad to operate its intrastate commuted fare service at a loss unless it is established that other classes of intrastate services likewise are operated at a loss?

State Statute Involved

The State Statute under which the New Jersey Board of Public Utility Commissioners in its legislative capacity (*Public Service Coordinated Transport* v. *State,* 5 N.J. 196, 224) issued its Decision and Order (reproduced in Appendix A, attached hereto) is New Jersey Revised Statutes 48:2-21d, N.J.S.A. (Appendix B, attached hereto).

The Federal Question Raised

The Federal Question of confiscation of Appellants' property in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States was raised by the opening statement of Appellants' counsel before the New Jersey Board of Public Utility Commissioners on May 17, 1950 (p. 97 of the 1950 transcript), and in the letter of Appellants' counsel addressed to the New Jersey Board of Public Utility Commissioners on August 22, 1950. The letter (see Appendix C, attached hereto) is a part of the record in this case. The issue was specifically argued in Appellants' briefs submitted to the Board on June 26, 1950 (pp. 24-25) and November 23, 1951 (pp. 14-16).

The Federal Question was considered in detail by the Supreme Court of New Jersey in the decision in this cause, review upon appeal of which is requested. The partial factual basis upon which that Court decided the Federal Question adversely to Appellants is so intermingled with the conclusion of law as to Appellants' Federal Constitutional rights as to make it necessary and appropriate for this Court upon appeal to analyze the facts in order to pass upon the Constitutional Questions. *United Gas Co.* v. *Texas,* 303 U.S. 123, 142-143; *Kansas City Southern Ry. Co.* v. *Albers Commission Co.,* 223 U.S. 573, 591.

That portion of the opinion of the Supreme Court of New Jersey in which the Federal Question is considered and adversely disposed of is attached hereto as Appendix D.

Appellants reiterated their position as to the Federal Question of substantive and procedural due process in their Petition For Rehearing. That petition was denied by the Supreme Court of New Jersey without opinion.

Statement

This proceeding has its origin in June, 1948, when Walter P. Gardner, then Trustee of The Central Railroad Company of New Jersey, and The New York and Long Branch Railroad Company (hereinafter sometimes referred to as "Appellants") filed tariff schedules to become effective on July 5, 1948, with the New Jersey Board of Public Utility Commissioners (hereinafter referred to as the "Board") and with the Interstate Commerce Commission, respectively, increasing intrastate and interstate commuted fares. The then existing commuted fares were the same for similar distances for both intrastate and interstate traffic and the proposed increases were the same.

These tariffs were suspended by the Board in June under authority of N.J.S.A. 48:2-21d. Hearings as to the justness and reasonableness of the fares proposed by Appellants were held jointly before the Board and an Interstate Commerce Commission Examiner, who was considering the similar contemporaneously filed interstate fares. Those hearings, at which voluminous testimony and numerous extensive exhibits were presented by Appellants, were not completed until January 7, 1949. The Board, by its Decision of March 15, 1949, permanently suspended the proposed tariffs and authorized Appellants to establish a scale of intrastate commuted fares higher than those in effect, but lower than those which Appellants had filed. The Board's action was in harmony with that of the Interstate Commerce Commission which had announced its decision four days earlier.

Prompted by a so-called "Petition for Reconsideration"

the Board, on March 6, 1950, ordered a rehearing as to the Appellants' intrastate commuted fares. Additional evidence at this rehearing showed that, after restating the accounts to eliminate non-recurring items, the Jersey Central had deficits in net income of $2,050,000 for 1948 and $4,203,000 for 1949. The evidence also showed that the Jersey Central's commutation revenues for 1948 were $3,234,000 and for 1949 were $3,426,000, increases of approximately $368,000 and $561,000, respectively, over the commuted fare revenues for 1947, but that there had been substantial increases in out-of-pocket commutation costs since 1947. After making adjustments for decreases due to economies in operation, the increase in the out-of-pocket cost of providing commuted fare service for 1949 amounted to approximately $779,000.

Following the close of these hearings the Board rendered its decision and order of September 27, 1950, directing the reduction of the Appellants' commuted fares which would have resulted in an additional out-of-pocket loss of approximately $40,000. Appellants appealed to the Appellate Division of the Superior Court of New Jersey. The New Jersey Supreme Court took the matter under review, upon its own motion, upon certification.

In its opinion of May 21, 1951 that Court decided that since the Board had failed to make any basic findings of fact there was "no reasonable basis for the establishment of the rates decided upon by the Board in either the order of September 27, 1950, or the prior order of March 15, 1949." *Central R. Co. of N. J. v. Dept. of Public Utilities*, 7 N.J. 247, 263-264. In reversing the Board's decisions and orders the Court directed the Board to institute a rehearing, "• • • make its specific findings of fact and enter its order establishing just and reasonable rates • • •" (7 N. J. 247, 266).

The Board accordingly published an order upon July 25, 1951, fixing September 12th as the initial date for the remanded rehearing. The only additional evidence adduced at the remanded rehearing was that presented by Appellants. That evidence adjusted the cost study presented in the earlier hearings so as to reflect the situation prevailing in 1950 and 1951. This adjustment was necessary to enable the Board to determine just and reasonable fares for the future. Also, at the request of counsel for the Board, Appellants introduced testimony and exhibits showing the out-of-pocket expenses and deficits attributable solely to the intrastate commuted fare service.

Thus the proof at the remanded rehearing was that upon the basis of July 1951 expense levels the annual out-of-pocket cost had increased approximately $1,152,000 over that shown in the 1947 cost study. And this was the minimum net increase after full credit had been given to economies effected since the 1947 study in the amount of $557,000. The result of the increased cost of providing commuted fare service was that in 1950 Appellants had an out-of-pocket deficit of at least $2,066,000 of which a minimum of $294,000 was directly due to the intrastate commuted fare service. It was conservatively estimated that the comparable figures for 1951 would be $2,643,000 for all commuted fare service and $388,000 chargeable solely to intrastate traffic. Assuming that the higher level of fares proposed in the tariffs filed in June 1948 had been in effect during 1950 Appellants would have suffered an intrastate out-of-pocket loss of at least $194,000 and if those higher fares could have been charged in 1951, the out-of-pocket intrastate commuted fare loss would have been $284,000.

The evidence supporting these figures was prepared in the same manner as was the similar evidence introduced in the prior hearings. At no time during the remanded rehear-

ings did either the Board, counsel for the Municipalities or counsel for the Board question the reliability of these studies. And no evidence even tending to contradict or refute Appellants' testimony and exhibits was offered. Nor, except when the Board's Counsel inquired as to data which would have shown the expenses and revenue of Appellants' combined intrastate freight and passenger operations, did either the Board or the Board's Counsel at any time during these proceedings suggest that Appellants' evidence was insufficient.

During the course of the remanded proceedings counsel for the Board inquired of Appellants' counsel whether any evidence would be presented as to a rate base and rate of return with reference to the intrastate commuted fare service. He was told that Appellants regarded such evidence immaterial because the intrastate commuted fare service was rendered at a loss and therefore could not conceivably show a rate of return.

The matter was then submitted to the Board and after briefs had been filed by Appellants and the Municipalities the Board published its Decision and Order of December 20, 1951. In that Decision the Board again failed to make any specific findings of fact as to the out-of-pocket cost of providing the intrastate commuted fare service, the revenue derived from that service or the relation between the directly attributable cost and revenue. The Board did, however, make certain general "findings." Insofar as applicable upon this Appeal, they are that Appellants:

> "1. have failed to present any proof or evidence as to a property valuation which constitutes their rate base with reference to intrastate commutation service;
>
> 2. have failed to submit sufficient evidence from which the reasonableness of the accounts can be determined;

3. have failed to present any proof or evidence as to a rate of return developed by relating their income to the rate base;

4. * * *

5. * * *."

After having arrived at these broad conclusions and indicating in its Decision (p. 4) that Appellants should have introduced evidence segregated as to their overall intrastate freight and passenger business, the Board held that the fares proposed in the June 4, 1948, tariffs had not been shown to be just and reasonable and ordered Appellants to re-establish the lower fares which had been in effect at the time the 1948 tariffs were filed. Nothing in the Board's Decision and Order indicates that it concluded these lower fares which it had determined were too low in 1949 are now just and reasonable for the future. Thus, after exhaustive hearings which have extended over a period of four years and during which Appellants presented comprehensive evidence based upon extensive and incisive cost studies upon which the Board previously had relied, the Board, for the first time, held the evidence insufficient and required Appellants to reinstate the fares which it had previously found to be unjust and unreasonable.

The matter was again heard by the Supreme Court of New Jersey on certification upon its own motion, Appellants having appealed to the New Jersey Superior Court, Appellate Division. The New Jersey Supreme Court held that the Board correctly concluded Appellants' evidence was inadequate; that it was justified in ordering Appellants to decrease their intrastate commuted fares; that Appellants should have introduced evidence establishing that other intrastate services, as well as the intrastate commuted fare service, were operated at a loss; and that Appellants were required to establish a rate base.

The Opinion indicates that the New Jersey Court decided a rate base was essential in this case as a criterion against which the reasonableness of the annual charges for road and equipment depreciation could be tested. The record, however, clearly demonstrates without contradiction that if all charges for depreciation are excluded from Appellants' operating expenses, there remains a very substantial net out-of-pocket loss directly attributable to the rendition of the intrastate commuted fare service. For the year 1951, under existing fares, it was approximately $281,000 and if the fares proposed in the June 1948 tariffs had been in effect during 1951, the out-of-pocket loss due to the intrastate commuted fare operation would have been approximately $200,000.

Thus, as Appellants have consistently contended, evidence as to the valuation for rate making purposes of the property used or useful in intrastate commuted fare service is wholly immaterial here. There is no net income from that service which could be related to the base in order to develop a rate of return.

The New Jersey Supreme Court affirmed the order of the New Jersey Board of Public Utility Commissioners and from the final decree and judgment of that Court The Central Railroad Company of New Jersey and The New York and Long Branch Railroad Company have brought this appeal to the Supreme Court.

The Questions Are Substantial

The questions presented by this appeal are substantial and are of considerable importance to the public, the public utility regulatory bodies of the several states and to the railroad industry.

The effect of the order of the New Jersey Board of Public

Utility Commissioners and the final decree and judgment of the Supreme Court of New Jersey is to compel the Appellant railroads to supply a service at confiscatory rates. Such a requirement is directly contrary to the principle announced by this Court in *Smyth* v. *Ames*, 169 U. S. 466, reiterated in *Washington ex rel Oregon R. & N. Co.* v. *Fairchild*, 224 U. S. 510, firmly established in *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, and *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, and followed in numerous subsequent cases including *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Public Utilities Comm.*, 274 U. S. 344.

To attempt to justify this taking of Appellants' property upon the theory that a carrier must submit copious evidence for the sole purpose of establishing a rate base for the service in question and must show that other of its intrastate services are not profitable, when the voluminous and uncontradicted evidence proves that the service is operated at a large direct out-of-pocket cost and that there is therefore no net income to be related to the base in order to determine the rate of return, is to emasculate the principle of the cases cited above. Indeed, such a holding cannot stand in view of those decisions. *Banton* v. *Belt Line Ry.*, 268 U. S. 413.

Likewise, the refusal of the Board and the Supreme Court of New Jersey to accept this irrefuted evidence, and their consequent failure to hold that the intrastate commuted fares set forth in the 1948 tariffs are legally just and reasonable is a denial of procedural due process in violation of the Fourteenth Amendment to the United States Constitution. *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Public Utility Commission, supra;* See also *Railroad Commission of California* v. *Pacific Gas Co.*, 302 U. S. 388 (1938); *Ohio Bell Telephone Company* v. *Commission*, 301 U. S. 292.

Appellants urge that it is essential for the preservation of their constitutional rights and in the interest of the public, the state regulatory bodies and the railroad industry that the Supreme Court decide the questions presented.

Respectfully submitted,

JUDSON C. MCLESTER, JR.,
Counsel for Appellants.

APPENDIX A (Part 1)

SUPREME COURT OF NEW JERSEY

No. A141 September Term 1951

In the Matter of the Tariffs filed on increased local and joint passenger commutation fares in intrastate traffic effective July 5, 1948—THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and the NEW YORK & LONG BRANCH RAILROAD COMPANY

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and the NEW YORK & LONG BRANCH RAILROAD COMPANY, each a corporation organized under the laws of the State of New Jersey, *Appellants*

vs.

THE DEPARTMENT OF PUBLIC UTILITIES, BOARD OF PUBLIC UTILITY COMMISSIONERS, STATE OF NEW JERSEY, *Respondents*

Argued June 2, 1952. Decided June 26, 1952.

On appeal from Department of Public Utilities, Board of Public Utility Commissioners.

Mr. Judson C. McLester, Jr., of the New York Bar, argued the cause for the appellants. Mr. Charles D. Peet, of the New York Bar, on the brief. Mr. William F. Hanlon, Attorney.

Mr. Joseph Harrison argued the cause for the respondent. Mr. Frank H. Sommer, Deputy Attorney General, of counsel. Messrs. Edward S. Binkowski and John R. Sailer, Deputy Attorneys General, on the brief. Mr. Theodore D. Parsons, Attorney General of the State of New Jersey, Attorney.

The opinion of the court was delivered by

BURLING, J.

The Central Railroad Company of New Jersey and the New York & Long Branch Railroad Company (hereinafter referred to as the Railroads), New Jersey corporations, appealed an order (filed December 20, 1951) of the Board

of Public Utility Commissioners, Department of Public Utilities, State of New Jersey (hereinafter called the respondent) to the Superior Court, Appellate Division under the provisions of Rule 3:81-8. Prior to hearing before that Court certification of the controversy was allowed upon our own motion.

The order of the respondent from which the instant appeal stems relates to the intrastate commuted (passenger) fares of the Railroads, and constitutes a sequel to the decision of this court setting aside two orders of the respondent filed during earlier phases of these proceedings. See *Central R. Co. of N. J.* v. *Dept. of Public Utilities*, 7 N.J. 247 (1951). A brief outline of the entire proceedings is warranted on the present appeal in view of the course they have followed.

The Railroads participated in rate adjustment proceedings before the respondent in 1947 which culminated in the respondent's order effective early in 1948, resulting in an increase in intrastate commuted fares. This order was not appealed.

In June 1948 the Railroads having become dissatisfied with the results of the existing intrastate commuted fares filed schedules of new proposed increases therein with the respondent. A stay of the effective date of these filed schedules, and a hearing on the reasonableness thereof was ordered by the respondent. This was the inception of the proceedings under review, being Docket No. 4000 of the respondent. The stay so ordered was continued by consent pending the initial hearings and until the respondent filed its order of March 15, 1949. This order rejected the schedules as filed but allowed the Railroads an increase in their rates for intrastate commuted fare passengers. The resultant increased fares became effective March 27, 1949, and are those under which the Railroads are currently operating this category of service. On July 5, 1949 groups representing passengers of the railroads affected by the fare increase filed with the respondent a "Petition for Reconsideration". The intervenors' action in this respect stirred the respondent to an exercise of its statutory authority to order a rehearing. See *Central R. Co. of N. J.* v. *Dept. of Public*

Utilities, supra (7 N. J. at pp. 250-252 and 254-255). The respondent, at the close of the rehearing so initiated, on September 27, 1950, entered an order reducing the intrastate commuted fares to a level recommended by an Interstate Commerce Commission examiner (but apparently not adopted by the Interstate Commerce Commission), but which level was higher than that of the rates in existence at the time of the inception of these proceedings in 1948.

The Railroads appealed the September 27, 1950 order of the respondent, arguing that there was no evidence reasonably to support the order, that it was without the jurisdiction of the respondent and violated the Railroads' constitutional rights. Our review of the proceedings disclosed that neither the March 15, 1949 order nor the September 27, 1950 order was valid. The March 15, 1949 order failed to include findings of fact on rate base, expenses, and rate of return (see 7 N.J. at p. 263) and the September 27, 1950, order was similarly deficient, this court, *inter alia*, expressly holding that the September 27, 1950 order contained "no finding of fact concerning expenses" (see 7 N.J. at p. 264). This court set aside both of the foregoing orders and remanded the matter to the respondent for a rehearing on all the evidence adduced, including that evidence introduced at the initial hearings, the rehearing ordered by the respondent and the second rehearing resulting from the mandate of this court. It was carefully pointed out that the burden of proof remained with the Railroads until the ultimate determination of the matter (see 7 N.J. at pp. 255-257). The Railroads did not seek a rehearing on any of the issues involved.

Pending the appellate review above recited the rate level of the Railroads' intrastate commuted fares was maintained under a stay granted by the Superior Court, Appellate Division, at the scale resulting from the March 15, 1949 order of the respondent. The stay was in effect continued by the mandate of this court pending rehearing on remand.

On December 20, 1951 the respondent, after a rehearing of these rate proceedings, ordered pursuant to the mandate of this court, denied the increase in intrastate com-

muted fares sought by the Railroads for the reason that the Railroads had not shown the same to be just and reasonable and ordered the Railroads to revert to the rates existing in 1948 when these proceedings had their genesis. The Railroads appealed from this order to the Superior Court, Appellate Division, and applied for a stay of execution thereof. This court, prior to hearing of the appeal and of the motion for stay before the Appellate Division allowed certification on our own motion. At the same time we granted a stay of the effect of the respondent's December 20, 1951 order, the net result being the maintenance of the level of rates effected pursuant to the March 15, 1949 order of the respondent pending the present review.

Before proceeding to a discussion of the questions involved in this appeal it is observed that the respondent in the December 20, 1951 order made no findings as to the quantum of the Railroads' rate bases and of a fair rate of return. Under the circumstances of the case now apparent this was not erroneous. The Railroads at the rehearing subsequent to the remand by this court agreed that the rehearing was of the entire proceedings, the original case (Docket No. 4000), but when asked to present proofs as to rate base and rate of return, stated for the record: "We do not propose to present any such proof because the intrastate commutation service, just as all other commutation service, is rendered at a loss. Since it is a losing service, there cannot possibly be any return whatsoever and therefore we deem a rate base to be wholly immaterial."

As for the expense-income factor, the Railroads appear to have relied solely on the evidence introduced at the remanded rehearing, for they stated to the respondent at that time: "before we close our case, we will put in evidence upon which we are content to stand as a matter of law, showing that our intrastate commutation business is conducted at a loss, and on that basis we deem a rate base immaterial." However, the respondent, as required by the mandate of this court, made its findings upon the evidence upon which the Orders of March 15, 1949 and September 27, 1950 were based as well as upon the additional evidence which was produced in the remanded rehearing. The respondent found that the Railroads had failed to present

any proof or evidence as to property valuations which constitute their rate bases, and had failed to present any proof or evidence as to a rate of return developed by relating their income to their rate bases. These findings are not questioned by the Railroads on this appeal and the reason therefor is obvious.

The foregoing recital leads directly to the principal questions involved in this appeal. These are whether a public utility which has filed tariffs increasing fares, in a hearing to determine the justness and reasonableness of the increase, is required to submit evidence as to rate base, and whether the evidence presented by the Railroads in these proceedings was sufficient legally to compel the respondent to approve the scale of intrastate commuted fares proposed by the Railroads in their tariffs filed June 4, 1948. Incidental questions involved are whether the respondent's Order of December 20, 1951 may be sustained on the ground that the Railroads failed to answer certain questions interposed by the intervenors at the proceedings resulting in the abortive September 27, 1950 Order (see 7 N.J. at p. 265); whether the respondent properly concluded that the Railroads were required to submit evidence beyond and in addition to its books of account to establish the reasonableness of such accounts; and whether the respondent properly concluded that in determining the reasonableness of commutation fares which allegedly show a loss it should consider and compare the overall intrastate operations, on which the Railroads failed to submit proof. Analysis of both the principal and incidental questions involved and the applicable principles of law directs the conclusion that the decision and order of the respondent filed December 20, 1951 should be affirmed.

The substantial question involved in this case is whether the Railroads may be required to establish a rate base to support their assertion of reasonableness of the rates proposed by them in June, 1948. Their contention is that no utility may be required to maintain any portion of its service at a loss and if it is proved that the specific service is operated at a loss then it is not incumbent upon them to prove the fair value of the property used and useful in that service. This in effect is an assertion that an exception

exists to the principles of law established in the application of our statute relating to the fixing of rates. The substance of these principles, pertinent to this question, is that the utility must prove its property valuation which constitutes its rate base, its expenses, and the rate of return developed by relating its net operating income to its rate base in proving the justness and reasonableness of its proposed increased rates. *Public Service Coordinated Transport* v. *State*, 5 N. J. 196, 216 (1950); *Central R. Co. of N. J.* v. *Dept. of Public Utilities, supra* (7 N. J. at p. 261). The circumstances of this case show that the valuation of the Railroads' property was in itself a paramount factor, for it is upon that factor that the variable of the allowance for annual depreciation, an operating expense of considerable importance in this case, depends. In determining reasonableness of rates for supplying a public service, there may be included in the operating expenses, as was attempted in the present proceedings, an allowance for consumption of capital, namely annual depreciation, in order to maintain the integrity of the investment in the service rendered. However, the annual allowances for depreciation are customarily credited to a depreciation reserve account and charged to operating expenses, and represent at a given time the amount of the investment which has been made out of the utility's rates for the ostensible purpose of replacing capital consumed. In determination of the question whether the annual allowance for depreciation charged to operating expenses is justified, there must be proof of the value of the property depreciated and as well proof of the depreciation reserve accumulated. Under the operating loss theory confiscation is the issue and the utility "has the burden of making a convincing showing that the amounts it has charged to operating expenses for depreciation have not been excessive". *Lindheimer* v. *Illinois Bell Telph. Co.*, 292 U. S. 151, 166-175, 78 L. ed. 1182, 1192-1196 (1934). Thus, although in some instances the "losing operation" theory may be tenable and may obviate in a clear case the necessity for proof of the utility's rate base, such is not the situation exhibited here.

The respondent contends that even assuming that the

intrastate commutation service of the Railroads is operated at a loss, i. e., that after sufficient evidence is introduced to show convincingly that the service does not produce sufficient revenue to meet the cost of operation, it does not follow that the State is precluded from requiring the continued operation of that service at a loss. It has been held that the problems in a legislative determination cannot be resolved alone by reference to the Railroads' loss in the operation of a specific unit of their service, but depend more upon the predominantly local factor of public necessity for the specific unit of service. *Alabama Pub. Serv. Com.* v. *Southern R. Co.*, 341 U. S. 341, 347, 95 L. ed. 1002, 1007-1008 (1951). In the latter case the U. S. Supreme Court cited with approval *Chesapeake & Ohio R. Co.* v. *Public Service Com.*, 242 U. S. 603, 608, 61 L. ed. 520, 523 (1917) wherein the same court held "That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered." Compare *Penna-Reading S. S. Lines* v. *Bd. of Pub. Utility Com'rs.*, 5 N.J. 114, 121, 125, 128 (1950).

The railroads seek to avoid the application of the foregoing principles, as so recently expressed in the *Alabama Public Service case, supra,* by reliance upon expression of the U. S. Supreme Court in other decisions. In *Banton* v. *Belt Line Ry. Corp.*, 268 U.S. 413, 69 L. ed. 1020 (1925) where an order of the New York Public Service Commission establishing joint routes on street railways in New York City, and a maximum joint fare of 5 cents, was involved, the United States Supreme Court held that the utility's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that portion of its business. In *Northern P. R. Co.*, v. *Dept. of Public Works,* 268 U.S. 39, 69 L. ed. 836 (1925) it was held that if existing rates were confiscatory there could be no reason for awaiting the test of much lower rates prescribed by the public service commission. The rates there pre-

scribed applied to intrastate transportation of saw logs, reducing prior existing rates thereon 15 to 37 per cent. The rationale of the decision was that the department erred in basing its finding on evidence which clearly did not support it. In *Vandalia Railroad Co.* v. *Schnull*, 255 U.S. 113, 65 L. ed. 539 (1921) however the specific holding was that the state has no power to select a particular commodity or class of traffic for carriage at less than cost or for nominal compensation. This was the rule pronounced in *Northern P.R. Co.* v. *North Dakota*, 236 U.S. 585, 59 L. ed. 735 (1915) where the U.S. Supreme Court had before it maximum intrastate rates for the transportation of one commodity, coal, in carload lots, which rates were fixed by a state statute. It was applied to intrastate passenger fares in *Norfolk & W. R. Co.* v. *Conley*, 236 U.S. 605, 59 L. ed. 745 (1915). In the latter case there was an admission by the state's expert witness that the *actual cost* of passenger carriage was 2 cents a mile, and it appears from the reported opinion that the rate fixed by the legislative authority was 2 cents a mile. The U.S. Supreme Court held that it was not necessary under such circumstances to prove the value of the property employed in the intrastate business, but it does not appear that the "actual cost" of supplying the service included an annual depreciation charge.

Analysis of all the decisions of the U. S. Supreme Court hereinabove adverted to indicates that where the state action under review involves a specific operation, such as the running of a certain transportation unit or the carriage of passengers over a particular portion of the railroad's lines the consideration of public need for the service may be paramount to the operating loss and save the order from invalidation on constitutional grounds, but where entire services are concerned, such as intrastate passenger service, although different categories of service may be required to be supplied at lower rates of return than others, no category of service may constitutionally be required to be maintained at a loss. The rationale of the latter theory is that excessive charges may not be placed on one class of service in order to provide a return on the carrier's entire service, where another class of service is maintained at a loss.

Norfolk and W. R. Co. v. *Conley, supra* (236 U. S. at 609, 59 L. ed. at p. 748). However, this is in essence a confiscation theory and the operating deficit must be convincingly proved.

The respondent in the present case determined that the Railroads had failed to carry the burden of proof imposed upon them to show the reasonableness of the increase in intrastate commuted passenger fares proposed by them in the schedules filed in June, 1948. The Railroads assert that this was error.

We have discussed rate base and its relationship to the annual depreciation item of operating expense. There are also included in the evidence several items charged to maintenance and to interest on investment. The legality of these items as operating expenses is not questioned by the respondent but it found that the only evidence before it of the Railroad's passenger revenues and expenses were book figures shown in annual reports and exhibits submitted by the Railroads. This finding is clearly supported by the record. It is contested by the Railroads on the ground that their books of account are the only available source of proof in this respect. This argument has no merit. There must be proof in the record not only of the amount of the various accounts but also sufficient evidence from which the reasonableness of the accounts may be determined. *Public Service Coordinated Transport* v. *State, supra,* (5 N. J. at pp. 218-219). On the depreciation factor, above adverted to, the burden of proof of the utility is not sustained by proof that its general accounting system has been correct for the mathematical calculations are based on underlying predictions which are matters of opinion and require examination of many variable elements, in which opportunities for excessive allowances even under correct accounting systems are always present. *Lindheimer* v. *Illinois Bell Telph. Co., supra* (78 L. ed. at pp. 1194-1197).

Another phase of the evidence meriting individual comment is the treatment of apportionment of operating expenses resulting in the allocations to intrastate commuted fare passenger traffic contained in the Railroads' exhibits. During the initial phase of the remanded rehearing the Railroads' witness Mr. Frederickson admitted that "at

the present time there is nothing before this Board by which they can deduce the intrastate commutation costs. . . ." The Railroads' counsel argued that the respondent would be "justified in looking at the overall loss from the commutation business" and stated "we will put in evidence upon which we are content to stand as a matter of law, showing that our intrastate commutation business is conducted at a loss. . . ." The respondent's counsel argued that it should have before it "sufficient evidence as to revenue and expenses related to the intrastate New Jersey commutation service, sufficient for the Board to determine whether or not that service is or is not being rendered at a loss." The Railroads argue to this court in their brief that the respondent and its counsel apparently approved the bases upon which allocations were made. The record refutes this assertion and indicates that the respondent made known to the Railroads its intention to weigh all the evidence introduced without objection from the Railroads. The Railroads made no study of overall intrastate operations stating "in order to secure a purely intrastate operation study it would be necessary for us to go through thousands and thousands of way bills to ascertain the intrastate portion of our revenue and then make a complete study of our expenses and separate them in some manner so as to secure those which are applicable solely to intrastate." This indicates the deficiency of supporting evidence as to allocation of expenses between passenger and freight traffic for it shows that the allocations made were general estimates without supporting evidence. The Railroads also failed to show the expense of operation of Reading and B. & O. trains using Central Railroad's tracks and operated by it—the commutation income was included but not the expense. What effect this proof if introduced would have had upon the mathematical formulae used by the Railroads' witnesses in allocating expenses to intrastate commutation service is left to conjecture. On an issue involving constitutional validity of state action general estimates of the sort here submitted should not be accepted as adequate proof to sustain a finding of confiscation but should be supported by adequate data. *Simpson* v. *Shepard*, 230 U. S. 352, 465-466, 57 L. ed. 1511, 1568 (1913).

A considerable proportion of the Railroads' exhibits were prepared upon the hypothesis of complete abandonment of commutation service. The Railroads thus attempted to justify allocation of various items of expense solely to commutation service, assuming that their regular fare passengers (and their freight service) now using the facilities which this hypothesis assumed would be unnecessary therefor, would be otherwise accommodated. The cost of providing one class of service is not properly determined by the hypothetical elimination of that service. Compare *Banton* v. *Belt Line Ry., supra* (60 L. ed. at p. 1026); *Railroad Com. of Cal.* v. *Pacific G. & E. Co.*, 302 U. S. 388, 398, 82 L. ed. 319, 325 (1938); *In re. New Jersey Power & Light Company*, — N. J. — (1952).

It further appears that a substantial portion of the exhibits relating to expenses introduced in evidence were prepared by using book cost figures of 1947 and applying various dollar translators, to show estimated costs for 1948-1951. The Railroads introduced evidence of asserted estimated adjustments to show savings from various changes in operation subsequent to 1947, but introduced no evidence to support their estimates, such as proof of comparability of maintenance and operational items of 1947 with those of 1948-1951, nor of the actuality of their estimates of the savings effected by reduction of service and of use of facilities. Compare *In re. New Jersey Power & Light Company, supra; West* v. *Chesapeake P. Telephone Co.*, 295 U. S. 662, 667, 672, 79 L. ed. 1640, 1647 (1935).

We are of the opinion that the respondent properly determined that the Railroads failed to carry their statutory burden of proving that the rate changes proposed by them in their filed schedules of June 1948 were just and reasonable. This renders it unnecessary to decide whether the respondent correctly held that the Railroads failed to answer sufficiently the 12 interrogatories addressed to them by the intervenors during the 1950 proceedings.

For the reasons above stated the order of the Board of Public Utility Commissioners, Department of Public Utilities, State of New Jersey, filed December 20, 1951, is affirmed.

APPENDIX A (Part 2)

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1950

No. A88

In the Matter of the Tariffs Filed on Increased Local and Joint Passenger Commutation Fares in Intrastate Traffic, Effective July 5, 1948—THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE NEW YORK & LONG BRANCH RAILROAD COMPANY

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE NEW YORK & LONG BRANCH RAILROAD COMPANY, Each a Corporation Organized Under the Laws of the State of New Jersey, *Appellants,*

vs.

THE DEPARTMENT OF PUBLIC UTILITIES, BOARD OF PUBLIC UTILITY COMMISSIONERS, STATE OF NEW JERSEY, *Respondent*

Argued February 26, 1951. Reargued April 2, 1951. Decided May 21, 1951, 7 N. J. 247.

On appeal from Board of Public Utility Commissioners.

Mr. Augustus C. Studer, Jr., and Mr. Charles D. Peet of the New York Bar, argued the cause for the appellants. Mr. Judson C. McLester, Jr., of the New York Bar, on the brief. (Messrs. McCarter, English & Studer, attorneys.)

Mr. William A. Roberts, of the District of Columbia Bar, argued the cause for the Intervenors, Inter-Municipal Group for Better Rail Service and Jersey Shore Protective Committee. Mr. Warren Woods and Morton R. Galane, of the District of Columbia Bar, on the brief. (Mr. Augustus S. Dreier, attorney for Inter-Municipal Group for Better Rail Service, and Mr. Lawrence A. Carton, attorney for Jersey Shore Protective Committee.)

Mr. Joseph Harrison argued the cause for the respondent.

The opinion of the court was delivered by

BURLING, *J.*:

This is a rate of fare case and involves an appeal by The Central Railroad Company of New Jersey and The New York & Long Branch Railroad Company (hereinafter referred to as the Railroads), each a New Jersey corporation, from a Final Decision on Rehearing and Order of the Board of Public Utility Commissioners, Department of Public Utilities, State of New Jersey (hereinafter referred to as the Board), filed on September 27, 1950, stemming from a written complaint termed "Petition for Reconsideration" lodged with the Board on July 5, 1949, by the Inter-Municipal Group for Better Rail Service and the Jersey Shore Protective Committee (hereinafter referred to as the Intervenors). The appeal, addressed to the Appellate Division of the Superior Court, has been certified to the Supreme Court upon our own motion, prior to hearing there.

The progress of the proceedings now presented to us for examination may be outlined as follows: As a result of proceedings before the Board in 1947, a schedule of fares then found by it to be reasonable for the future was inaugurated by the Railroads. The Railroads receiving less additional income from new fares under the 1947 schedule than anticipated, on June 4, 1948 filed with the Board certain proposed new tariffs to be effective July 5, 1948, publishing increased local and joint passenger commutation fares in intrastate traffic and changes and alterations in existing classification of such fares. The Board on its own motion initiated a hearing to determine whether those proposed fares, changes and alterations as filed would be unjust, unreasonable or unjustly discriminatory. By Order, under date of June 23, 1948, effective July 3, 1948, the Board suspended the aforementioned proposed increases, changes and alterations in local and joint intrastate passenger fares until October 3, 1948, and not having reached a decision on the evidence and testimony offered at public hearings pursuant to that order, on September 22, 1948, effective Octo-

ber 3, 1948, ordered a further suspension to January 3, 1949. The hearings were not completed when the year 1948 drew to a close, and it was stipulated by all interested parties that the latter Order of Suspension should continue in effect "beyond its legal limit and be concurrent with" a similar order issued by the Interstate Commerce Commission. Joint hearings by an examiner of that Commission and members of the Board which had been instituted on September 8, 1948, continued. The Board ultimately reached a conclusion and filed a decision on March 15, 1949, to the effect that the existing schedule of commutation fares (effective as a result of the proceedings in 1947) of the Railroads had become unjust and unreasonable, that the schedules of fares proposed and filed on June 4, 1948 by the Railroads were unjust and unreasonable and were disapproved, that an increased scale of rates which were over the rates in effect when the Railroads filed their proposed schedules in June, 1948, and set forth in the decision was just and reasonable and new schedules might be filed with the Board on five days' notice in conformity with that scale. Resultant increased fares were made effective March 27, 1949. Subsequently, on July 15, 1949, the Intervenors filed with the Board a "Petition for Reconsideration" addressed to both the Board and the Interstate Commerce Commission but relating primarily to the latter's findings and order, to which no answer was filed by the Railroads. This petition, however, stirred the Board to an exercise of its statutory authority to order a rehearing on its own initiative by means of a "Decision", dated March 6, 1950. The Board clearly indicated this action was taken on its own motion. The rates placed in operation March 27, 1949 were not disturbed.

Subsequently, hearings in the rehearing proceedings were had, namely, on March 30, 1950, May 17, 1950 and May 26, 1950.

During the course of the hearing on May 26, 1950, a witness for the Railroads was asked a series of 12 questions (hereinafter considered) relating to various items of expense and income. The Board at first ordered, June 14, 1950, that these questions, objected to on the ground of

immateriality, be answered by the Railroads, but later, June 21, 1950, rescinded the prior order as premature because written briefs had not been received. On August 8, 1950, the Board in another decision stated:

> "We think the questions are relevant and believe the respondent should have an opportunity to supply the answers if it elects to do so. We have concluded that we will not order it to respond to these questions."

The Railroads declined to answer the propounded interrogatories but indicated willingness to produce data maintained by them in the usual course of business from which the information sought could be elicited.

On September 27, 1950, the Board issued "Decision on Rehearing" concluding in the following language:

> "The Board after reopening Docket No. 4000 for further consideration, and after such further consideration in duly held proceedings in this matter, finds that the fares approved for the respondents in the Decision of March 15, 1949, will not be just and reasonable for the future but, if revised to the bases set forth as approved in Appendix I hereto:
>
> 1. Should yield an increase in revenue of which respondents are in need and to which they are justly entitled.
>
> 2. Will be as low as respondents can be required to maintain from a cost standpoint and at the same time will be reasonably related to one another and fair to the commuting public.
>
> 3. Are necessary in order that respondents may be enabled, under honest and efficient management, to provide adequate and efficient service, at the lowest cost consistent with the furnishing of such service, and
>
> 4. Will be just and reasonable for the future.
>
> On further consideration, the findings in the Board's decision of March 15, 1949, in Docket No. 4000, are modified accordingly and the Board Hereby Orders respondents to file schedules with the Board to become

effective October 15, 1950, in conformity with the scale approved by this Board as just and reasonable, as set forth in Appendix I hereto."

It is this decision or order that is the subject of the instant appeal.

Adjective Law

Forthwith, it is requisite that due consideration be given to the procedural course pursued by the Board. The record before us raises several procedural questions: Whether the method of obtaining rehearing was proper, where lies the burden of proof on rehearing and what is the scope of rehearing, and lastly what is the scope of review by this Court.

The applicable portions of the New Jersey statutes are:

R. S. 48:2-19: "Investigations; valuation of property of public utility. The board may:

a. Investigate upon its own initiative or upon complaint in writing any matter concerning any public utility;"

R. S. 48:2-21: "Rates.

* * * * * * *

Fix rates. b. The Board may after hearing, upon notice, by order in writing:

1. Fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility, whenever the board shall determine any existing rate, toll, charge or schedule thereof, commutation, mileage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential. In every such proceeding the board shall complete and close the hearing and enter its final order within six months after the filing of the order of the Board initiating such proceeding, when such

proceeding is on the board's own motion; and within six months after issue is joined through the filing of an answer to a complaint when such proceeding is initiated by complaint.

* * * * * * *

Increases in rates; hearings. d. When any public utility shall increase any existing individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates, or change or alter any existing classification, the board, either upon written complaint or upon its own initiative, shall have power after hearing, upon notice, by order in writing to determine whether the increase, change or alteration is just and reasonable. The burden of proof to show that the increase, change or alteration is just and reasonable shall be upon the public utility making the same. The board, pending such hearing and determination, may order the suspension of the increase, change or alteration until the board shall have approved the same, not exceeding three months. If the hearing shall not have been concluded within such three months the board may during such hearing and determination order a further suspension for an additional period not exceeding three months. The board shall approve the increase, change or alteration upon being satisfied that the same is just and reasonable."

R. S. 48:2-40. "* * * The board at any time may order a rehearing and extend, revoke or modify an order made by it."

The several questions above mentioned are hereinafter separately discussed.

A—Method of Obtaining Rehearing

It is insisted by the Railroads that the proper course for the Board to pursue in the event a rehearing is desired is to reserve jurisdiction by order on termination of the

original proceeding. There is no specific directive in the statute to support this proposition. Indeed, the statute precludes such a step, for it directs the Board to complete and close a hearing within 6 months after the order initiating the original proceedings when fixing rates (R. S. 48:2-21b 1, *supra*) and permits no suspension of increased rates in the corollary proceeding to consider reasonableness or rate changes for more than 6 months. Thus the legislative intent to require final disposition of initial rate proceedings within a maximum 6 months period is evident. On the other hand, it is equally evident that the legislature intended no bar to further hearings on the same subject matter, for the Board is authorized to investigate upon its own initiative or upon complaint in writing any matter (which would necessarily include fares) concerning any public utility, R. S. 48:2-19, *supra*, and at any time to order a rehearing and extend, revoke or modify an order made by it, R. S. 48:2-40, *supra*. The comprehensive legislative design is one of continuous supervision, with a mandate to the Board to resolve initial investigations, expeditiously, and yet granting to it concomitant authority to institute corrective proceedings and especially where experience furnishes evidence of failure of an earlier order to accomplish its intended purpose.

We find no fault with the action of the Board in initiating a rehearing. The evident circumstance that its independent action was prompted by the Interevnors' petition is of no moment.

B--Burden of Proof

Much of the argument of the Railroad is directed to the burden of proof, as to justness or reasonableness of rates, to the effect that the burden of proving existing or proposed rates unjust or unreasonable should have been borne by (a) the Intervenors or petitioners for rehearing, or (b) the Board.

Reverting to the statute, R. S. 48:2-21d, *supra*, we discover that upon a hearing involving rate increases, whether ordered by the Board upon its own initiative or resulting from written complaint, the utility making the increase is

forced to carry the burden of proof. It is suggested that there is no specific legislative direction of this nature in connection with renearings.

The Railroads state that this court has indicated tacit approval of the proposition that the burden of proof, i.e., that rates are unjust and unreasonable, on rehearing is on the Board by quoting the Board's own statement in its opinion in *Public Service Coordinated Transport* v. *State*, 5 N. J. 196, 213, 214 (1950) as follows:

> "In our decision of May 5, 1948, being mindful of the uncertainties inherent in the estimates of the future results to be realized from the increased fares allowed, we expressly reserved jurisdiction in the matter for the purpose of giving further consideration to the effect of the new fares so that if it should appear that a revision of the fare schedules therein approved should be required in the public interest, we could on our own motion institute such revision. If we had closed the proceeding and had not reserved jurisdiction, the burden of proof to show that the seven cent fare was unjust and unreasonable would have rested upon the Board, as representing the public. The result of our reserving jurisdiction is that the burden of proof to show that the seven cent fare is just and reasonable is upon the applicants. We also required the applicants to submit monthly statements of operating income under the revised fares."

A careful analysis of that portion of the opinion (pp. 213, 214) shows clearly that all that was there stated was the order there under review was provisional and additional notice to the public must be given where an initial hearing is ordered by the Board (p. 212). This court said: (p. 213)

> "From the foregoing it is apparent that it was clear to all parties from the very outset of the 1949 hearings that this was but a continuation of the previous case, that the proceeding was still the same one that had been instituted by the companies' petition, and that the Order to Show Cause had merely been the means of

reopening the case and requiring the companies to go forward with further proof in support of their petition for a rate increase."

This leaves for us to decide whether the burden of proving justness and reasonableness of rates should be borne by the utility throughout the conduct of a rehearing which is formally ordered. We decide that it is on the utility.

In answer to the contention that the burden should be borne by the Intervenors it is necessary only to reiterate that the burden of justifying the reasonableness of rates is placed upon the utility by statute, R.S. 48:2-21d, *supra*, in *any* hearing whether ordered by the Board on written complaint or its own initiative. See *Public Service Coordinated Transport v. State* (p. 213) *supra*. Here, the "Petition for Reconsideration" could have been considered a written complaint the Board, although "granting" the petition, in effect ignored it and grounded its order for rehearing on its inherent authority under R.S. 48:2-40 (i.e., to order the rehearing on its own initiative). This procedure was not improper and was within the scope of the statute.

C—Conduct of Rehearing

It is clear that the Board, an administrative body, acts as a legislative agency of the State in the exercise of its rate making powers. *Public Service Coordinated Transport v. State* (at p. 224) *supra, State Board of Milk Control v. Newark Milk Co.,* 118 N. J. E. 504, 521, 522, (E & A 1935); *Millville Electric Light Co. v. Board of Public Utility Com'rs of New Jersey,* 3 N. J. Misc. 412 (Sup. Ct. 1925) aff'd *per curiam* 103 N. J. L. 198 (E & A 1926); *Hackensack Water Company v. Board of Public Utility Commissioners,* 96 N. J. L. 184 (E&A 1921). At the same time it also in many respects conducts its business in a *quasi* judicial manner. *Lakewood Express Serv. v. Board of Public Utility Com's,* 1 N. J. 45 (1948). We are now presented with the question whether upon a formal rehearing an administrative agency, vested with powers partaking of both legislative and judicial attributes, should consider the record of the original hearing as well as the evidence submitted to it during the course of the rehearing.

There is no doubt in our minds that the Board must consider the entire record, including the records of both the original hearing and the rehearing. Compare *Public Service Coordinated Transport* v. *State* (p. 213), *supra*. That this was understood by the Board is evident from the comments of members of the Board, counsel and witnesses at the rehearing resulting in the order of September 27, 1950, as well as from the decisions and orders of the Board handed down on March 6, 1950 and September 27, 1950.

D—Scope of Review

The legislative determinations of state administrative agencies are brought before the court pursuant to *Rule* 3:81-8 as amended September 15, 1948, the current counterpart of the former proceeding for review through the use of the prerogative writ of *certiorari*. Review in the past was taken to the former Supreme Court by *certiorari*. A legislative direction contained in R. S. 48:2-43 provides: "Any order made by the Board may be reviewed upon *certiorari* by the supreme court. The evidence presented to the board together with the findings and the order issued thereon, shall be certified by the board to the supreme court as its return."

Prerogative writs were superseded when the judicial article of the Constitution became effective in 1948 and in lieu thereof review, hearing and relief was directed to be provided by rules of this court by means of actions in lieu of prerogative writs. N. J. Const. 1947, Art. VI, sec. V, par. 4. This constitutional mandate was complied with, resulting in the adoption by this court of *Rule* 3:81 and subsequent amendments thereto. *Rule* 3:81-8 provides for appeal to the Appellate Division of the Superior Court from determinations of State administrative agencies. The Superior Court consequently is vested with the prerogative powers exercised by the former Supreme Court, with the exception of the discretion formerly obtaining in that court to grant or deny the issuance of prerogative writs.

Certification of a matter to this court for decision, while the same is pending before the Appellate Division of the Superior Court is an innovation in New Jersey procedure

pursuant to the Constitution of 1947. This court thereby assumes in their entirety the obligations of the Appellate Division.

Art. VI, sec. II, par. 2, Constitution of 1947, gives this court appellate jurisdiction in the last resort in all causes provided in the Constitution, and Art. VI, sec. V, par. 1, clause (d) provides for appeals on certification by this court to the Superior Court. When we exercise the right of certification to the Appellate Division of the Superior Court on our own motion prior to hearing there we are bound to review the matter so certified on all points properly presented to that court for determination. Therefore we are called upon to decide this matter on its merits, if that review is possible on the findings and evidence in the record before us.

In determining our authority and duty on review as above outlined, we are guided in part by the legislative expression although our prerogative powers are not thereby confined. This legislative statement takes form in the following section of our statutes:

> R.S. 48:2-46. "Setting aside orders.
>
> The supreme court is hereby given jurisdiction to review any order of the board and to set aside such order in whole or in part when it clearly appears that there was no evidence before the board to support the same reasonably or that the same was without the jurisdiction of the board.
>
> "No order shall be set aside in whole or in part for any irregularity or informality in the proceedings of the board unless the irregularity or informality tends to defeat or impair the substantial right or interest of the prosecutor in certiorari."

Although the legislature has expressed that orders of the Board are not to be set aside unless there was no evidence before the Board to support the same reasonably (R.S. 48:2-46, *supra*), it is established that if such legislative suggestion were a limitation upon a court constitutionally exercising the powers formerly exerted through the medium of prerogative writs, the statute would be repugnant to the constitution. The statute now incorporated in R. S. 48: 2-46

was enacted at a time when the former Supreme Court was in existence and exercised ancient inherent jurisdiction over prerogative writs. That court, in *Public Service Co.* v. *Public Utility Board*, 84 N. J. L. 463, 466 (Sup. Ct. 1913) said:

> "• • • We are given jurisdiction to set aside the order of the commissioners when it clearly appears that there was no evidence before the Board to support reasonably such order or that the same was without the jurisdiction of the board. On its face this section confers jurisdiction upon this court, but a jurisdiction of a limited character, only to be exercised when it clearly appears that there is no evidence before the board to support their order, or where the order is without their jurisdiction. If this language is taken literally, we should be powerless in any case within the jurisdiction of the board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be. It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature cannot limit us in the exercise of our ancient prerogative."

The above decision of the former Supreme Court was affirmed in *Public Service Gas Co.* v. *Board of Public Utility Com'rs*, 87 N. J. L. 581 decision on reargument at p. 597 (E & A 1915), and on writ of error in the U. S. Supreme Court was dismissed on stipulation 242 U. S. 666, 667, 61 L. ed. 552 (1917).

We proceed to an examination of the construction the courts have placed on the authority and duty so vested in us.

The Board stands between the carrier and the passengers to effect a just and reasonable status. This court said, in *Public Service Coordinated Transport v. State, supra* (at pp. 224-225):

> "The chief power of this Court in rate cases is to review the reasonableness of the rates fixed by the

> Board. We can say, however, that the rate which a public utility may reasonably charge should be sufficient to encourage good management and furnish a reward for efficiency, to enable the utility, under efficient and economical operation, to maintain and support its credit; and to enable it to raise money necessary for the proper discharge of its public duties. It can never be more than the reasonable worth of the service supplied; neither can it be fixed so low as to be confiscatory. If within these limits and supported by competent evidence, rates set by the Board would clearly be just and reasonable."

It is now firmly settled in our system of jurisprudence that there must be sufficient or substantial competent and relevant evidence to support the findings of fact and reasonableness of the rates established by the Board. *Public Service Coordinated Transport v. State,* 5 N. J. 354, 375 (1950); *N. J. Bell Tel. Co. v. Communications Workers, etc.* (at pp. 378, 379) *supra.* Compare *National Dairy Products Co. v. Milk Control Board,* 133 N. J. L. 491 (Sup. Ct. 1945) (considering action taken by the State Milk Control Board); *Universal Camera Corp. v. N. L. R. B.,* — U. S. —, 95 L. ed. 285 (U. S. Sup. Ct. Feb. 26, 1951) (considering the history and construction of the Federal Administrative Procedure Act and the Taft-Hartley Act). Where the reasonableness of fixed rates is challenged and subjected to judicial review, the court is required to consider the evidence and resolve for itself the issue of reasonableness. See *Public Service Coordinated Transport v. State, supra,* at p. 215 and authorities there cited. In the *Public Service* case, we further said: (p. 216)

> "The justness and reasonableness of a particular rate of fare can only be determined after an examination of a company's property valuation which constitutes its rate base; its expenses, including income taxes and an allowance for depreciation; and the rate of return developed by relating its income to the rate base."

We held that in the event any of the three factors mentioned is not reasonably supported by the proofs the rate of fare itself is unreasonable.

Furthermore, the prevailing rule is that findings of facts below are essential in rate cases and may not be supplied by implication *N. J. Bell Tel. Co. v. Communications Workers, etc.*, (p. 375) *supra; Colorado Wyoming Gas Co. v. Federal P. Com.*, 324 U. S. 626, 89 L. ed. 1235 (1945); *Wichita Railroad & L. Co. v. Public Utilities Com.*, 260 U. S. 48, 67 L. ed. 124, 130 (1922). See 43 Am. Jur., Public Utilities and Services, sec. 184, p. 695, sec. 221, p. 718; *Mt. Carmel Pub. Utility & Serv. Co. v. Public Utilities Commission*, 297 Ill. 303, 130 N. E. 693, 21 A. L. R. 571 (Ill. Sup. Ct. 1921). In the case of *N. J. Bell Tel. Co. v. Communications Workers, etc., supra*, we have recently been called upon to examine this phase of the problem and have said:

"The requirement of findings is far from a technicality and is a matter of substance. It has been said that it is a fundamental of fair play that an administrative judgment express a reasoned conclusion. *Federal C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 84 L. ed. 656 (1940). A conclusion requires evidence to support it and findings of appropriate definiteness to express it. * * *"

"The courts of this State have not been silent with respect to the necessity of specific findings and determination of facts by administrative agencies. See *Penna. R. R. Co. v. N. J. State Aviation Com.*, 2 N. J. 64 (1949); *Gianfrancisco v. Public Service, etc., Transport*, 11 N. J. Misc. 219 (Sup. Ct. 1933); *Rojeski v. Pennington Dairy Farms, Inc.*, 118 N. J. L. 335 (Sup. Ct. 1937); and *Hughes v. N. J. State Highway Dept.*, 129 N. J. L. 273 (Sup. Ct. 1942).

"Clearly it is the function of the administrative authority and not the courts to find the facts. Findings must be free from ambiguity which raises a doubt as to whether the administrative authority proceeded upon a correct legal theory. The most reasonable and practical standard is to require that findings of fact be sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review an administrative decision and ascertain if the

facts upon which the order is based afford a reasonable basis for such order. This is a necessary rule where, as here, the findings of fact are conclusive upon review, if supported by evidence. See 146 A. L. R. 209, *et seq.*" *N. J. Bell Tel. Co. v. Communications Workers, etc.*, 5 N. J. 354, 375, 376 (1950).

The Merits of the Case

We now move to the application of the foregoing principles to the disposition of the appeal before us. The question is whether there is sufficient basis in the record, procedurally and factually to support the order of the Board under review.

We are called upon to determine the reasonableness of a rate established under our statute in the light of well established principles. The important question so raised is whether the three factors hereinabove referred to, necessary to the establishment of a reasonable rate, namely the company's property valuation which constitutes its rate base, its expenses, and the rate of return developed by relating its income to its rate base, are found by the Board and rested upon evidence to support the same reasonably. In this investigation of the record and determination of the reasonableness of the rate established, we must view the entire proceedings culminating in the Board's order of September 27, 1950. This necessarily includes consideration of the orders of March 15, 1949 and March 6, 1950. It is evident that the Board likewise considered itself bound to resort to the entire record, rather than solely the record made on rehearing, in rendering its decision of September 27, 1950.

In the decision of March 15, 1949, the Board recited numerous items of fact and conclusions incidental to the determination, but we fail to discover any finding of the three ultimate facts requisite for determination of a reasonable fare, viz., property value, expenses and rate of return developed by relating income to the rate base. All that may be deduced from that order is that the Railroads were losing money—the Board found that the existing rates (resulting from 1947 proceedings before the Board) were

therefore unjust and unreasonable. The Board found that the Railroads had failed to carry the burden of proving the new rates proposed by them in June 1948 to be reasonable and disapproved those prospective new rates. The Board's conclusion that other increased rates for lesser amounts would be reasonable is unsupported by any findings of fact. The burden of proof as to the justness and reasonableness of those rates likewise remained with the Railroads since the rates of fare established by the Board constituted an increase over the rates in effect at the time the Railroads filed their schedules of proposed increases in June, 1948.

The decision of the Board of March 6, 1950, which set in motion the machinery of the rehearing, merely established that the Board deemed it necessary to re-examine the circumstances surrounding the Railroad's financial status and commutation operational results, facts existent in the period of operation of the fares resulting from the order of March 15, 1949. On September 27, 1950, the Board's final decision and order subject of this appeal was filed. This order, as was the case of the order of March 15, 1949 above discussed, failed to state any finding of fact as to rate base, which is the foundation stone of a rate determination. *Public Service Coordinated Transport v. State, supra* (at p. 217). Although finding that the rates established pursuant to the order of March 15, 1949 "will be unjust and unreasonable for the future," there is no finding of fact concerning expenses nor one relating income to rate base. Hence there is no reasonable basis for the establishment of the rates decided upon by the Board in either the order of September 27, 1950 or the prior order of March 15, 1949. In the recent pronouncement of this court in the case of *N. J. Bell Tel. Co. v. Communications Workers, etc., supra,* (at p. 376) it is stated:

> "In one of the oft-quoted cases, *Florida v. United States,* 282 U. S. 194, 75 L. ed. 291 (1931), it was said that in the absence of basic or essential findings to support an order of the Interstate Commerce Commission, the evidence would not be examined in order to

resolve opposing contention. That philosophy was followed in *Atchison T. & S. F. R. Co. v. United States,* 295 U. S. 193, 79 L. ed. 1382 (1935) wherein the court said, at page 201 of the U. S. report:

"This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States,* 282 U. S. 194, 215, 75 L. ed. 291, 305, 51 S. Ct. 119. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Ref. Co. v. Ryan,* 293 U. S. 388, 433, ante 446, 465, 55 S. Ct. 241. See *Beaumont, S. L. & W. R. Co. v. United States,* 282 U. S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1; *Interstate Commerce Commission v. Chicago, B & Q. R. Co.,* 186 U. S. 320, 341, 46 L. ed. 1182, 1193, 22 S. Ct. 824."

The intervenors have pressed the argument in support of the order of September 27, 1950, that the rates established pursuant to the order of March 15, 1949 were discriminatory, that the Board in its order of September 27, 1950 so found, and that the evidence in the record supports this finding. Although the Board so found and the evidence in the record is indicative of the validity of its conclusion, this factor is not separable from the determination of reasonableness of rates made in the September 27, 1950 order and is insufficient of itself to support that order.

For complete disposition of this case an incidental question must be considered.

It seems that there exists a strong disagreement between the parties concerning the admissibility of the answers sought to certain 12 propositions propounded to the Railroads. The Board in its Order of August 8, 1950, determined the questions to be relevant but failed to order the Railroads to reply thereto. The Railroads contend the data sought

was relevant but not material and was foreign to the proper scope of the rehearing. It is apparent that the evidential information requested was relevant. The Board is not bound by the technical rules of evidence, R. S. 48:2-32, but were it so restricted the 12 items could have been clarified by proper response. They constitute requests for material data within the purview of R. S. 48:2-36.1 which provides, *inter alia:*

> "The data which the board is hereby empowered to require to be compiled may relate and extend to services rendered, business done, transactions had, and property located, within or without this state where such data is material and relevant to the inquiry, investigation or proceeding so undertaken by, or pending before the board."

The Board should have ordered the Railroads to answer the questions.

Conclusion

For the reasons above stated, we are compelled to and do hereby set aside the orders of the Board of March 15, 1949 and September 27, 1950. The record and proceedings are remanded to The Department of Public Utilities, Board of Public Utility Commissioners, State of New Jersey, for rehearing on the evidence upon which the orders of March 15, 1949 and September 27, 1950 were based, as well as upon such additional evidence if any as may be produced. R.S. 48:2-47.

We are authorized by the statute, R.S. 48:2-47, supra, where we deem it equitable and just to remand a rate case to the Board for rehearing, to direct that such rehearing be had upon "such terms and conditions as are reasonable". Since the proceedings before the Board resulting in the orders of March 15, 1949 and September 27, 1950, hereby set aside, are entire, there is consequently no decision of reasonableness of the rate schedules filed by the Appellant Railroads in June, 1948; the statutory permission for suspension of the proposed tariffs has been exhausted but the statute

fails to direct that in such event those proposed fares become effective. The result of our decision, in the absence of a specific direction to the contrary, would therefore be the establishment of the higher fares proposed by the Railroads in their schedules filed in June, 1948, pending the disposition of the rehearing. In the alternative, by virtue of our authority under R.S. 48:2-47, we could order a stay of those proposed higher fares, thus relegating the Railroads to the fares in existence prior to June, 1948. We are not disposed to adopt either of these alternatives. The broad authority of the statute may not be lightly exercised, but in the instant case we are faced with confusion of rates and inconvenience to the commuting public, as well as discrimination between commuters on the several carriers' lines in this state, if the full impact of our action is permitted to fall without an effort to ease its effect. Under these circumstances we direct that the rehearing be had upon the following terms and conditions: (1) The Board shall promptly institute a rehearing, on due notice, and shall complete the same and make its specific findings of facts and enter its order establishing just and reasonable rates within 6 months from the date of the filing of the mandate of this court; (2) the rates in effect as set forth in the Board's order of March 15, 1949, which have remained in effect since they became effective shortly thereafter by virtue of a stay of the effective date of the Board's order of September 27, 1950 ordered by the Appellate Division of the Superior Court on October 13, 1950 under *Rule* 3:81-12 upon the term that the Appellants promptly reimburse any purchaser of an intrastate commuted fare ticket for the excess fare he shall have paid the Appellants as a result of such stay in the event of an ultimate adverse decision, shall continue in effect pending the rehearing, and (3) in the event the rates found to be reasonable and placed in effect as a result of the rehearing hereby ordered are less than those currently in effect under the aforesaid order of the Board of March 15, 1949, the Appellants shall promptly reimburse any purchaser of an intrastate commuted fare ticket for the excess fare he shall have paid the Appellants as a result of the stay heretofore ordered by the Appellate Division of the Superior Court and under the terms of this

order, and (4) the Appellants, by posting printed notices in their stations and by distributing printed notices to the purchasers of intrastate commuted fare tickets issued by the Appellants, which became valid on and after October 15, 1950, shall advise such purchasers that such tickets will be subject to refund for the difference, if any, between the fares charged and the lower fares prescribed by the Board of Public Utility Commissioners of the State of New Jersey if the action of the Board in prescribing such lower fares is upheld, and that such refund will be made only upon the surrender of the contract portion of the ticket, which will not be taken up by the Trainmen.

APPENDIX A (Part 3)

STATE OF NEW JERSEY

DEPARTMENT OF PUBLIC UTILITIES

BOARD OF PUBLIC UTILITY COMMISSIONERS

Docket No. 4000

In the Matter of the Tariffs Filed on Increased Local and Joint Passenger Commutation Fares in Intrastate Traffic, Effective July 5, 1948—The Central Railroad Company of New Jersey and The New York and Long Branch Railroad Company

Joseph Harrison, Deputy Attorney General and Henry B. Freefield, for Board of Public Utility Commissioners.

Augustus S. Dreier, William A. Roberts, Warren Woods and Solomon Lautman, for Inter-Municipal Group for Better Rail Service and Jersey Shore Protective Committee.

John B. Graf, by Francis X. Fahy, for City of Jersey City.

Judson C. McLester, Charles D. Peet, Donald R. Colvin and Earle J. Harrington for The Central Railroad Company of New Jersey and The New York and Long Branch Railroad Company.

Decision on Remanded Rehearing

By the Commission:

By its Decision of May 21, 1951, in *The Central Railroad Company of New Jersey, et al. v. The Department of Public Utilities* (1951) 7 N. J. 247, the New Jersey Supreme Court remanded the above titled matter to the Department of Public Utilities, Board of Public Utility Commissioners, State of New Jersey, for rehearing on the evidence upon which the Orders of the Board dated March 15, 1949 and September 27, 1950 were based, as well as upon such additional evidence, if any, as may be produced.

An application for rehearing by counsel for protestant municipalities was denied by the Supreme Court and immediately thereafter conferences were held by counsel for the Board and all interested parties to define and clarify the issues.

By its Order dated July 25, 1951, the Board ordered The Central Railroad Company of New Jersey and The New York and Long Branch Railroad Company, hereinafter referred to as Respondents, to post and maintain for 30 days printed notices of the time and place of the first remanded rehearing in conspicuous locations in all trains operated in New Jersey on which commutation tickets are honored and at all stations in New Jersey served by such trains. The first hearing was set for and took place on September 12, 1951. Succeeding hearings were held on September 26, 1951 and on October 24, 1951, when the matter went to conference, with the submission of briefs at the option of the parties. Two briefs were received, one from Respondents and one from the Inter-Municipal Group for Better Rail Service and Jersey Shore Protective Committee.

In its Order dated July 25, 1951 the Board, in addition to the setting of a time and place for hearing and the posting of notices, directed Respondents to file with the Secretary of the Board on or before September 12, 1951, answers in writing to the twelve questions commented upon in the opinion of our Supreme Court and finally, Respondents were ordered to comply in all other respects with the findings, provisions and orders of the Court as set forth and contained in its opinion.

Respondents, by letter dated September 11, 1951, submitted data and explanatory statements as their answers to the twelve questions posed by counsel for the protestants in his letter addressed to the Secretary of the Board on May 18, 1950. At the opening of the hearing on September 12, 1951, counsel for Respondents offered for filing with the Board several large volumes and other records containing passenger traffic data for specific periods, which volumes were referred to in Respondents' letter of September 11, 1951, in the answers to the first and eleventh of the twelve questions. The Board allowed Respondents to keep those records in their custody, with the understanding that protestants would have access to them in any manner most convenient to protestants, consistent with Respondents' interest in preserving these records, which were stated by Respondents to be the sole copy of the data therein contained.

Since 1948, when this proceeding began, Respondents have introduced voluminous testimony and exhibits showing revenue derived from commutation business and expenses allocated thereto to support its contention that Respondents incur enormous and everincreasing losses in handling commutation business, which losses will only partially be offset by the proposed increases in the tariffs filed June 4, 1948 to become effective July 5, 1948. At the latest hearing, held as a result of the remand of this proceeding by the Supreme Court, Respondents adjusted their 1947 cost study to January 1950 levels and to July 1951 levels, and for the first time showed a separation of their commutation expenses and revenues between interstate and intrastate operations. Respondents indicate by these latest exhibits that due to increased expenses since 1947, the losses due to commutation in 1951 and in 1950 were greater than they were in 1947, and that the 1951 losses were larger than the 1950 losses.

Respondents' Exhibits RH-38 and RH-39 show the estimated loss from intrastate commutation based on cost levels of January 1950 and July 1951, with commutation revenue based on the tariffs filed June 4, 1948. These exhibits indicate that if the tariffs filed June 4, 1948 had become effective, the intrastate commutation net loss on an

annual basis as of January 1950 was $194,459 and as of July 1951 was $284,763. Exhibit RH-40 shows that based on March 1950, the estimated monthly increase in intrastate commutation revenue by the application of tariffs filed June 4, 1948 in lieu of tariffs effective March 27, 1949 is $8,308.75 or approximately $100,000 per annum. Thus the net losses shown in Exhibits RH-38 and RH-39 adjusted to tariffs in effect in January 1950 and July 1951 would be approximately $100,000 more per annum, as indicated in Respondents' Exhibits RH-36 and RH-37. The estimated net losses from intrastate commutation shown in the last-named exhibits are $294,336 per annum based on January 1950 cost levels and $388,163 per annum based on July 1951 cost levels.

Respondents' 1947 and subsequent commutation cost studies were based on principles outlined in Statement No. 441 of the Interstate Commerce Commission, Bureau of Transport Economics and Statistics, titled "Formula Providing for a Comparison of Railway Revenues with Expenses for Suburban and Commutation Service," dated January 1944 and designated as "Rail-Commutation 10-43". This formula, commonly referred to as the "Edwards Formula", states on its title page that it has not been considered or adopted by the Interstate Commerce Commission. Nevertheless that Commission has relied on the application of the formula in railroad commutation rate cases involving the Jersey Central and other railroads.

At the hearing on October 24, counsel for the Board asked Respondents' witness if he could tell the Board what the overall intrastate business of The Central Railroad of New Jersey is within the State of New Jersey. Objection of Respondents' counsel on the ground that the testimony and exhibits show the commutation service as a whole is operated at a loss and in view of that fact the matter of the entire service is irrelevant, was overruled, after counsel for the Board and for Respondents were heard. The witness answered that the railroad had not made any study of their overall intrastate operations, and to get such information it would be necessary to go through thousands of freight waybills, then make a complete study of the expenses and separate them in some manner so as to secure

those which are applicable solely to intrastate (R. pp. 47-52). Thus the record does not show or support any possible claim by the Respondents that all of its intrastate operations, including its intrastate commutation service, are conducted at a loss.

The commutation revenues and expenses of Respondents are a part of its passenger revenues and expenses. However, the only evidence before the Board of Respondents' passenger revenues and expenses are book figures shown in annual reports and exhibits submitted by Respondents. Concerning such figures our Supreme Court held in the Public Service case, *Public Service Coordinated Transport v. State*, 5 N. J. 196 (1950):

> "* * * The dangers inherent in accepting the books of account at face value in a rate proceeding are apparent. The prescription of a uniform system of accounts by regulatory commissions, such as the Board of Public Utility Commissioners, has been uniformly accompanied by the qualifications that in prescribing the system of accounts, the commissioners do not commit themselves to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining other matters before the commission.
>
> "Neither this Court nor the Board can accept the books of account of a public utility at face value in a rate case in which reasonableness is always the primary issue. * * * There must be proof in the record not only as to the amount of the various accounts but also sufficient evidence from which the reasonableness of the accounts can be determined. Indeed R.S. 48:2-21 (d) specifically provides that 'The burden of proof to show that the increase, change or alteration (in rates) is just and reasonable shall be upon the public utility making the same.' Lacking such evidence, any determination of rates must be considered arbitrary and unreasonable."

In their brief, Respondents refer to the uncontradicted and unchallenged evidence of losses in intrastate commutation service as shown in their cost studies and assert that

this is the evidence upon which the Board must place its decision in this matter. Further, Respondents argue, evidence pertaining to a rate base for Respondents' intrastate commuter fare service is immaterial and irrelevant in this case because Respondents will continue to operate that service at a substantial out-of-pocket loss after the proposed fares have been made effective.

At the hearing of September 26, 1951, counsel for the Board asked counsel for Respondents whether he intended to present any evidence as to a rate base and rate of return with reference to intrastate commutation service. The answer was the Respondents did not propose to present any such proof because the intrastate commutation service, just as all other commutation service, is rendered at a loss and since it is a losing service, there cannot possibly be any return whatsoever and, therefore, Respondents deem a rate base to be wholly immaterial (R. pp. 34-35).

As to these contentions of Respondents, on the record and in brief, the Board directs Respondents' attention to the language of the Court in the opinion which remanded this proceeding to the Board for rehearing:

> "In the decision of March 15, 1949, the Board recited numerous items of fact and conclusions incidental to the determination, but we fail to discover any finding of the three ultimate facts requisite for determination of a reasonable fare, viz., property value, expenses and rate of return developed by relating income to the rate base. All that may be deduced from that order is that the railroads were losing money—the Board found that the existing rates (resulting from 1947 proceedings before the Board) were therefore unjust and unreasonable. The Board found that the Railroads had failed to carry the burden of proving the new rates proposed by them in June 1948 to be reasonable and disapproved those prospective new rates. The Board's conclusion that other increased rates for lesser amounts would be reasonable is supported by any findings of fact. The burden of proof as to the justness and reasonableness of those rates likewise remained with the Railroads, since the rates of fare established by the Board con-

stituted an increase over the rates in effect at the time the Railroads filed their schedules of proposed increases in June, 1948.

"The decision of the Board of March 6, 1950, which set in motion the machinery of the rehearing, merely established that the Board deemed it necessary to re-examine the circumstance surrounding the Railroad's financial status and commutation operational results, facts existent in the period of operation of the fares resulting from the order of March 15, 1949. On September 27, 1950, the Board's final decision and order subject to this appeal was filed. This order, as was the case of the order of March 15, 1949 above discussed, failed to state any finding of fact as to rate base, which is the foundation stone of a rate determination. *Public Service Coordinated Transport* v. *State, supra* (at p. 217)." (5 N.J. 196, 217 (1950)). "Although finding that the rates established pursuant to the order of March 15, 1949 'will be unjust and unreasonable for the future,' there is no finding of fact concerning expenses nor one relating income to rate base. Hence there is no reasonable basis for the establishment of the rates decided upon by the Board in either the order of September 27, 1950 or the prior order of March 15, 1949. • • •"

In the record made in Docket No. 4000, including therein the evidence upon which the Orders of the Board dated March 15, 1949, and September 27, 1950, were based as well as the additional evidence which was produced in the remanded rehearing, the Board makes the following findings of fact:

1. Respondents have failed to present any proof or evidence as to a property valuation which constitutes their rate base with reference to intrastate commutation service.

2. Respondents have failed to submit sufficient evidence from which the reasonableness of the accounts can be determined.

3. Respondents have failed to present any proof or evidence as to a rate of return developed by relating their income to the rate base.

4. Respondents have failed to comply with the third part of the Board's Order dated July 25, 1951, relating to answers to twelve questions commented upon in the opinion of the Supreme Court of New Jersey, 7 N. J. 247 (1951), to the extent that failure to elicit intrastate commutational data from Respondents emphasized the fact that the Board lacked the data on which it could proceed to a determination.

5. Respondents have failed to comply with the fourth part of the Board's Order dated July 25, 1951, under which the Board ordered Respondents to comply in all other respects with the findings, provisions and orders of the New Jersey Supreme Court as set forth and contained in the opinion of said Court decided May 21, 1951.

According to the Supreme Court Decision of May 21, 1951, the Board's Orders of March 15, 1949 and September 27, 1950 were set aside, and consequently the Board must reach a decision on the reasonableness of the commutation rate schedules filed by Respondents in June, 1948.

On the record, therefore, this Board finds and determines that the schedules of increased intrastate commutation fares issued June 4, 1948 to become effective July 5, 1948, as proposed by Respondents, have not been shown by Respondents, to be just and reasonable and are, therefore, hereby disapproved, and Respondents are *hereby ordered* to re-establish the intrastate commutation rates which were in effect on June 4, 1948, such re-establishment to become effective not later than January 13, 1952.

Dated: December 20, 1951.

BOARD OF PUBLIC UTILITY COMMISSIONERS,

(S.) By: JOHN E. BOSWELL,

(Seal) *President.*

Attest:

(S.) EMMETT T. DREW,
Secretary.

I hereby certify the foregoing to be a true copy of a Decision on Remanded Rehearing rendered by the Board of Public Utility Commissioners and ordered filed by said Board.

SECRETARY.

APPENDIX B

NEW JERSEY REVISED STATUTE 48:2-21, N. J. S. A.

Schedule of rates. a. The board may require every public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare or charge made, charged or exacted by it for any product supplied or service rendered within the state, as specified in the requirement.

Fix rates. b. The board may after hearing, upon notice, by order in writing:

1. Fix just and reasonable individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates which shall be imposed, observed and followed thereafter by any public utility, whenever the board shall determine any existing rate, toll, charge or schedule thereof, commutation, milage or other special rate to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential. In every such proceeding the board shall complete and close the hearing and enter its final order within six months after the filing of the order of the board initiating such proceeding, when such proceeding is on the board's own motion; and within six

months after issue is joined through the filing of an answer to a complaint, when such proceeding is initiated by complaint.

2. Fix just and reasonable joint rates, which shall be charged, enforced, collected and observed by railroads and street railroads in the carrying of freight. Whenever the railroads or street railroads involved fail to agree upon the apportionment or division of a joint rate so established, the board may issue a supplemental order declaring the apportionment or division of the joint rate.

Demurrage rates. c. The board may fix the rates or charges to be made by any corporation subject to the provisions of this chapter for the detention of a railroad car containing property transported by railroad to any point in this state or for the use of railroad tracks occupied by such car, commonly called demurrage or car service, or for both such detention and use. Such rates and charges shall conform as nearly as possible to the rates and charges for demurrage or car service prescribed and fixed by the interstate commerce commission for similar service.

Increases in rates; hearings. d. When any public utility shall increase any existing individual rates, joint rates, tolls, charges or schedules thereof, as well as commutation, mileage and other special rates, or change or alter any existing classification, the board, either upon written complaint or upon its own initiative, shall have power after hearing, upon notice, by order in writing to determine whether the increase, change or alteration is just and reasonable. The burden of proof to show that the increase, change or alteration is just and reasonable shall be upon the public utility making the same. The board, pending such hearing and determination, may order the suspension of the increase, change or alteration until the board shall have approved the same, not exceeding three months. If the hearing shall not have been concluded within such three months the board may during such hearing and determination order a further suspension for an additional period not exceeding three months. The board shall approve the increase, change or alteration upon being satisfied that the same is just and reasonable.

APPENDIX C

LETTER OF AUGUST 22, 1950 FROM JUDSON C. McLESTER, JR., GENERAL COUNSEL, TO BOARD OF PUBLIC UTILITY COMMISSIONERS

(Letterhead of The Central Railroad of New Jersey)

August 22, 1950.

Emmett T. Drew, Secretary
Board of Public Utility Commissioners
State of New Jersey
Trenton, New Jersey

Re: In the Matter of Petition of Respondent Municipalities for Rehearing in the Matter of Tariffs Filed on Increased Local and Joint Passenger Commutation Fares in Intrastate Traffic, Effective July 5, 1948—The Central Railroad Company of New Jersey and The New York and Long Branch Railroad Company

DEAR MR. DREW:

This is in response to the "Decision and Order" in the above-entitled matter directed to and received by The Central Railroad Company of New Jersey upon August 14, 1950. As ordered by the Board of Public Utility Commissioners in proviso number "2" of that "Decision and Order", the Railroad Company herewith notifies the Board and the Protestants of its position concerning the twelve questions set forth at pages 245 to 251 of the record.

Respondent has, at all times, been willing to make available the full detail and work sheets upon which the testimony and exhibits of its witness, Robert Frederickson, were predicated at this rehearing and indeed has expressed the willingness to produce any data maintained by it in the usual course of business. (R. pp. 198, 257, 259, 261, 267; Br. pp. 20-21). This is still Respondent's position.

However, to the extent that the questions referred to above requested the submission of data in addition to that referred to in the preceding paragraph, the Respondent

objected on the grounds that such data was not material to the issues involved in this matter and was beyond the proper scope of this rehearing. Furthermore, the Board in its "Decision and Order" recognized that "to supply the answers to these questions will require considerable effort and will entail substantial expense." Incurring such expense to furnish immaterial data would be a disregard of the public interest in transportation costs. Respondent, therefore, has determined not to answer the questions.

Respondent's position with respect to its intrastate commutation fares is that any reduction by the Board would improperly burden interstate commerce in contravention of Article I, Section 8 of the United States Constitution and would be confiscatory, in violation of the due process clause of the 14th Amendment to the Constitution.

Respondent, as agreed at the hearing on May 26 (Tr. pp. 274, 278, 279), submits the matter to the Board for its decision upon the basis of the record before it.

Very truly yours,

JUDSON C. MCLESTER, JR.

APPENDIX D

The substantial question involved in this case is whether the Railroads may be required to establish a rate base to support their assertion of reasonableness of the rates proposed by them in June, 1948. Their contention is that no utility may be required to maintain any portion of its service at a loss and if it is proved that the specific service is operated at a loss then it is not incumbent upon them to prove the fair value of the property used and useful in that service. This in effect is an assertion that an exception exists to the principles of law established in the application of our statute relating to the fixing of rates. The substance of these principles, pertinent to this question, is that the utility must prove its property valuation which constitutes its rate base, its expenses, and the rate of return developed by relating its net operating income to its rate base in proving the justness and reasonableness of its proposed increased rates. *Public*

Service Coordinated Transport v. State, 5 N. J. 196, 216 (1950); *Central R. Co. of N. J. v. Dept. of Public Utilities, supra* (7 N. J. at p. 261). The circumstances of this case show that the valuation of the Railroads' property was in itself a paramount factor, for it is upon that factor that the variable of the allowance for annual depreciation, an operating expense of considerable importance in this case, depends. In determining reasonableness of rates for supplying a public service, there may be included in the operating expenses, as was attempted in the present proceedings, an allowance for consumption of capital, namely annual depreciation, in order to maintain the integrity of the investment in the service rendered. However, the annual allowances for depreciation are customarily credited to a depreciation reserve account and charged to operating expenses, and represent at a given time the amount of the investment which has been made out of the utility's rates for the ostensible purpose of replacing capital consumed. In determination of the question whether the annual allowance for depreciation charged to operating expenses is justified, there must be proof of the value of the property depreciated and as well proof of the depreciation reserve accumulated. Under the operating loss theory confiscation is the issue and the utility "has the burden of making a convincing showing that the amounts it has charged to operating expenses for depreciation have not been excessive". *Lindheimer v. Illinois Bell Telp. Co.*, 292 U. S. 151, 166-175, 78 L. ed. 1182, 1192-1196 (1934). Thus, although in some instances the "losing operation" theory may be tenable and may obviate in a clear case the necessity for proof of the utility's rate base, such is not the situation exhibited here.

The respondent contends that even assuming that the intrastate commutation service of the Railroads is operated at a loss, i.e., that after sufficient evidence is introduced to show convincingly that the service does not produce sufficient revenue to meet the cost of operation, it does not follow that the State is precluded from requiring the continued operation of that service at a loss. It has been held that the problems in a legislative determination cannot be resolved alone by reference to the Railroads' loss in the operation of

a specific unit of their service, but depend more upon the predominantly local factor of public necessity for the specific unit of service. *Alabama Pub. Serv. Com. v. Southern R. Co.*, 341 U. S. 341, 347, 95 L. ed. 1002, 1007-1008 (1951). In the latter case the U. S. Supreme Court cited with approval *Chesapeake & Ohio R. Co. v. Public Service Com.*, 242 U. S. 603, 608, 61 L. ed. 520, 523 (1917) wherein the same court held "That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered." Compare *Penna-Reading S. S. Lines v. Bd. of Pub. Utility Com'rs.*, 5 N. J. 114, 121, 125, 128 (1950).

The railroads seek to avoid the application of the foregoing principles, as so recently expressed in the *Alabama Public Service Case, supra,* by reliance upon expression of the U. S. Supreme Court in other decisions. In *Banton v. Belt Line Ry. Corp.*, 268 U. S. 413, 69 L. ed. 1020 (1925) where an order of the New York Public Service Commission establishing joint routes on street railways in New York City, and a maximum joint fare of 5 cents, was involved, the United States Supreme Court held that the utility's fair share of the joint rate would be substantially less than the operating expenses and taxes justly chargeable to that portion of its business. In *Northern P. R. Co., v. Dept. of Public Works,* 268 U. S. 39, 69 L. ed. 836 (1925) it was held that if existing rates were confiscatory there could be no reason for awaiting the test of much lower rates prescribed by the public service commission. The rates there prescribed applied to intrastate transportation of saw logs, reducing prior existing rates thereon 15 to 37 per cent. The rationale of the decision was that the department erred in basing its finding on evidence which clearly did not support it. In *Vandalia Railroad Co. v. Schnull,* 255 U. S. 113, 65 L. ed. 539 (1921) however the specific holding was that the state has no power to select a particular commodity or class of traffic for carriage at less than cost or for nominal compensation. This was the rule pronounced in *Northern P. R.*

Ca. v. North Dakota, 236 U. S. 585, 59 L. ed. 735 (1915) where the U. S. Supreme Court had before it maximum intrastate rates for the transportation of one commodity, coal, in carload lots, which rates were fixed by a state statute. It was applied to intrastate passenger fares in *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 59 L. ed. 745 (1915). In the latter case there was an admission by the state's expert witness that the *actual cost* of passenger carriage was 2 cents a mile, and it appears from the reported opinion that the rate fixed by the legislative authority was 2 cents a mile. The U. S. Supreme Court held that it was not necessary under such circumstances to prove the value of the property employed in the intrastate business, but it does not appear that the "actual cost" of supplying the service included an annual depreciation charge.

Analysis of all the decisions of the U. S. Supreme Court hereinabove adverted to indicates that where the state action under review involves a specific operation, such as the running of a certain transportation unit or the carriage of passengers over a particular portion of the railroad's lines the consideration of public need for the service may be paramount to the operating loss and save the order from invalidation on constitutional grounds, but where entire services are concerned, such as intrastate passenger service, although different categories of service may be required to be supplied at lower rates of return than others, no category of service may constitutionally be required to be maintained at a loss. The rationale of the latter theory is that excessive charges may not be placed on one class of service in order to provide a return on the carrier's entire service, where another class of service is maintained at a loss. *Norfolk and W. R. Co. v. Conley, supra* (236 U. S. at 609, 59 L. ed. at p. 748). However, this is in essence a confiscation theory and the operating deficit must be convincingly proved.

10

FILED
DEC 22 1952
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 511

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE NEW YORK AND LONG BRANCH RAILROAD COMPANY, each a Corporation organized under the laws of the state of New Jersey,

Appellants,

vs.

THE DEPARTMENT OF PUBLIC UTILITIES, BOARD OF PUBLIC UTILITY COMMISSIONERS, STATE OF NEW JERSEY,

Appellee.

Statement of Appellee Making Against the Jurisdiction of the Supreme Court of the United States to Review on Appeal the Judgment in Question, Including Appellee's Motion to Dismiss the Appeal

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The Appellee, believing that the motion set forth below will demonstrate the lack of substance the question raised in this appeal, files this, its statement, in opposition to Appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss appeal on the ground of lack of jurisdiction, or in the alternative affirm the judgment of the Supreme Court of New Jersey, on the ground that the

questions raised by the Appellant are so unsubstantial as not to need further argument.

This cause does not appear to be reviewable by the Supreme Court of the United States. Appellee asserts, however, that jurisdiction is lacking under the statute. In addition, the unsubstantial character of the grounds stated by Appellant are so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this state of the proceeding.

The matters relied upon by Appellee are more particularly stated below:

I. Matters and Grounds Making Against Jurisdiction

A consideration of all the record, the decisions of the Supreme Court of New Jersey in 7 N. J. 247 (1951) and 10 N. J. 255 (1952) and the Decision of the Board of Public Utility Commissioners dated December 21, 1951 will show that this was a series of proceedings to inquire into the justness and reasonableness of the commutation fare tariffs filed with the Appellee June 4, 1948. The proceedings were conducted under R. S. 48:2-21 (d).

However, nowhere in the proceedings below was the validity of the state statute (i.e. R. S. 48:2-21 (d)) challenged as being repugnant to the Constitution, treaties, or laws of the United States. It was the actions of the Board of Public Utility Commissioners under that statute that was challenged in the Supreme Court of New Jersey. The primary issue was the materiality of the evidence as to rate base.

Two questions, therefore, arise in this matter.

First, is there a federal question raised in view of the fact that the Appellee did not raise the validity of the statute below but only argued as to its construction and application; and

Second, is there a substantial federal question involved

A. Is There a Federal Question?

Although the jurisdiction of the Board of Public Utility Commissioners over the subject matter is based upon R. S. 48:2-21 (Appellant's Appendix B), it is confined by the Constitutions of the United States and State of New Jersey and the applicable cases thereunder. Any action of the Board of Public Utility Commissioners is tested first by the statute and then by the Constitutions controlling. In order to challenge the validity of the statute the question must be raised in the proceedings below. A consideration of the last decision in the Supreme Court of New Jersey 10 N. J. 255 (1952) will show that the statute was not cited therein.

The Appellee, therefore, urges upon this court the fact that no jurisdiction exists under 28 U.S.C.A. 1257 (2) as contended by Appellant. The only objection raised by Appellant as to this situation was not as to its constitutionality but as to its application and construction. The court did not pass upon the constitutionality of this question, consequently the validity was not raised nor was it passed upon. Therefore, since they failed to raise the question and validity was not passed upon they cannot appeal from such a judgment.

B. Is There a Substantial Federal Question Raised?

The Appellants now in this appeal claim that they have raised a federal question.

In all the proceedings below the Appellants failed to submit evidence as to rate base as shown in the Supreme Court of New Jersey decision 10 N. J. 255 at page 261 ". . . 'we (sic. Appellants) will put in evidence upon which we are content to stand as a matter of law, showing that our intrastate commutation business is conducted at a loss, and on that basis we deem a rate base *immaterial.*' " The Ap-

pellants admitted this in their Statement as to Jurisdiction, filed herein, at page 8 where the Appellants say, "During the course of the remanded proceedings counsel for the Board inquired of Appellants' counsel whether any evidence would be presented as to a rate base and rate of return with reference to the intrastate commuted fare service. He was told that *Appellants regard such evidence immaterial* because the intrastate commuted fare service was rendered at a loss and therefore could not conceivably show a rate of return." (Emphasis supplied.) The Appellants had every opportunity to submit the evidence. Therefore, he cannot claim a lack of due process at this time.

For these reasons this court should decline to take jurisdiction in this cause.

II. Motion to Dismiss or Affirm

Comes now, the Department of Public Utilities, Board of Public Utility Commissioners, State of New Jersey, the appellee herein, by Joseph Harrison, its counsel, and moves this court to dismiss with costs the appeal herein to this court by the Central Railroad Company of New Jersey and the New York and Long Branch Railroad Company, upon the following grounds:

1. The assignment of error filed herein does not draw in question the validity of a state statute (i.e. R. S. 48:2-21 (d)) of the State of New Jersey on the ground of its being repugnant to the constitution, treaties or laws of the United States, and no decision herein of the Supreme Court of New Jersey passed on that question. Therefore an appeal under 28 U. S. C. A. 1257 (2) should not be allowed.

2. The question of the validity of a state statute (i.e., R. S. 48:2-21 (d)) was not raised in the Supreme Court of New Jersey or before the Board of Public Utility Commissioners.

In the alternative, appellee moves this court to affirm the judgment from which the appeal in the above entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Dated: November 7, 1952.

THEODORE D. PARSONS
Attorney General of the
State of New Jersey.

By: JOSEPH HARRISON
Special Deputy Attorney General.
Counsel for Appellee.

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